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Knegt, R.

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A farewell to ‘protection’: rethinking the labour law-market nexus


Robert Knegt
University of Amsterdam,
Hugo Sinzheimer Institute
E: R.Knegt@uva.nl

Summary:
In the course of the 19th century ‘protection’ of workers has gradually gained legitimacy as an important aim of labour legislation. Labour law has tended to be opposed, in terms of a ‘counter-veiling power’, to a naturalized labour market. In the paper I analyse the use of the term ‘protection’ and argue that this opposition and the conception of ‘protection’ as compensating for a one-sided vulnerability of employees are unnecessary impediments to the further development of labour law. The development of markets has always been indissoluble interwoven with that of regulation. The model of the market, rather than ‘describe’ economic action (as economists tend to see it), provides for a normative model in its own way. If ‘protection’ would be discarded as its aim, how could labour law than be legitimized otherwise? In the second part of the paper I propose to go along with the market view of labour relations, in order to inquire to what extent basic labour law rules can be derived from functional requirements of labour markets – provided that we use social theory on market action to reach out for a broader conception of what is required for a labour market to function. A broader conception may include, among others, requirements as to the continuity of existence of markets themselves. The possibilities as well as the restrictions of such an approach are discussed.
Introduction

Discourse on the purpose of ‘labour law’ as we know it, is “remarkably ahistorical”. And if it treats its history at all, it restricts itself more often than not to what would have gone wrong during the Industrial Revolution. Its conventional story is about labour relations that, after first having been freed from the shackles of feudal duties and of guilds, then developed from a zero point, located somewhere at the beginning of the 19th century, at which an equality had been proclaimed that only later in the century turned out to degenerate, into actual relations of utter inequality and injustice. These undesirable side-effects of economic progress were gradually to be compensated for by state regulation that was then embraced and systemized by legal experts into a new legal and academic field, differentially named ‘labour law, ‘employment law’ or - especially if it included social security and/or the provision of health care or housing as well - ‘social law’. This tale of labour law is a pleasant one since it has an overtone of good works: exclusion of the weak is followed by inclusion thanks to the charitable support of the strong.

This tale, however, is utterly inadequate Whig history. In support of this critical assessment I will here touch on just two points. First, regulation of labour conditions dates back at least to the 10th century (on health & safety in mining) and wage labour was in Britain and in the Netherlands already in a majority in the 14th century. Secondly, the guilds - nowadays still suffering under the bad repute that the French Revolution succeeded in imputing to them - often fulfilled, in a quite sophisticated manner, a lot of functions that would later be hailed as ‘new’ achievements of ‘welfare states’, including regulation of labour and social security arrangements. If one would take the effort of looking, over the proverbial wall that has been raised at this zero point, further into the past, there is much more continuity of regulation of labour relations to be seen than the conventional story would suggest.

In defining the field, labour lawyers have drawn boundaries between those categories of people that would deserve legal compensation of their unequal position, and those that would not. Attribution to one category or the other has been made dependent on characteristics of the ‘situation’ of workers; relevant criteria are either ‘dependency’ or ‘inequality’. These criteria usually appear to refer to some kind of contradiction between, on the one hand, the competences citizens may legitimately claim to be endowed with and, on the other hand, what (categories of) people (workers) are actually able to realize in shaping their concrete labour relations. During the high times of industrialization remedies to inequality were rather self-evidently sought either in substantive regulation or in facilitating collective arrangements, thereby defining to a large extent what ‘labour law’ had to consist of. During the second half of the nineteenth century and the first half of the twentieth century nation states established and strengthened their hold on industrial relations by state regulations that were framed in terms of ‘protection’ of workers.

Nowadays post-industrial labour relations, in combination with an established hegemony of economic discourse in politics, have challenged received ideas about “the idea of labour law”, about

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2 At issue here is what recently have been coined ‘capabilities’, the term by which Amartya Sen refers to ‘having a practical choice to achieve the functionings (i.e. the states and activities that are constitutive of a person’s being) that people value and have reason to value’.
what it would stand for and what constitutes its identity as a body of law and as a legal discipline.\(^3\) We thus seem to be involved in a renewed fundamental discussion of what are, or should be the defining characteristics of ‘labour law’, if it is to keep its relevance for well-being in the domain of labour relations. What will be the (new, ethical ?) narrative that keeps it together?\(^4\)

A dominant theme in the discussion about the current position and the future of labour law is its relation to economics. The urge to take position in this flows from a generally hostile stance of mainstream economics towards labour law as being predominantly a hindrance to market efficiency. The positions that are taken differ. Some authors tend to adjust labour law to the economic discourse, either whole-heartedly, functionalizing its legal machinery, or giving-in half-way, arguing that labour law in fact contributes to efficiency, while admitting that its institutions might be adapted to increase flexibility and ‘employability’.\(^5\) Others argue that labour law, apart from its ‘correcting’ (of negative externalities) and ‘limiting’ (of the market in view of well-being) role, has also a ‘market-constituting’ role.\(^6\) Still others acknowledge economics’ knowledge claims, while professing their conviction of the rightness of labour law’s independent claims to contribute to justice in labour relations, if necessary in spite of their opponents’ claim to efficiency.\(^7\) Still others criticize economics’ view of labour relations as a very partial and restricted type of knowledge, convenient to some, but essentially subordinate to constitutional models of citizenship.\(^8\)

I will argue that, in so far as this discussion remains caught in the framework of a ‘protection’ that labour law ought to give to ‘dependent’ workers brought in a socially disadvantageous position by the regular working of labour markets, it will be hard to make any progress towards a legal order adjusted to 21st-century relations regarding productive activities. In this paper two directions of a solution will be explored. For that purpose, I start by borrowing insights from recent social theory in order to alter our view of the relation between knowledge and economic practices. As a result, the current contradiction between economics (as describing ‘inside’ natural mechanisms of markets) and labour law (as normatively imposing restrictions from ‘outside’) will largely disappear. From this crossroads two routes seem to lie open. Either we can reintegrate what is now being defined as ‘economics’ into a broader array of knowledge of social relations, taking away the current opposition by relocating economics into a subordinate position. Or we open up the currently tight economic presuppositions of market behavior and try to integrate these insights in theories of (labour) markets. On the latter route, which is the one that I will in particular explore, we would not (yet) have to look for an external normative foundation, but labour law rules could to some extent be conceived as functional requirements that flow from specific characteristics of labour markets. I will outline the possibilities as well as the restrictions of such an approach.

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\(^7\) Langille 2011: 106.

Brian Langille argued that talk of ‘inequality of bargaining power’ is economic nonsense if intended to be a claim within market theory, and he therefore valuates it as an external comment on the limitations of that theory. While he thereby endorses the empirical claims of market theory, I would rather regard this as a reason to reflect on what may be wrong with this theory. What if we would take it serious and criticize its externalization of normativity, its abstraction from what is being traded on the market and explore its potentialities?

2 ‘Protection’ as a crucial aim and legitimation of labour law

‘Protection’ is a term that is often, rather unreflectively, used to indicate the goals of labour legislation.\(^9\) Why would it be so self-evident, in societies that commonly stress the responsibility of every citizen to take care of his or her own private affairs, that the nation state would be ‘protecting’ some of them?

One historical explanation of the easy acceptance of its self-evident character might be found in a long Western tradition of mutuality in the relation between rulers and ruled, that is by some authors considered to be a specific characteristic of the development of Western societies.\(^10\) In this tradition the obligations of rulers are to a large extent defined in terms of ‘protection’ of subjects, in a three-fold sense of (1) protection from foreign enemies, (2) protection from violent behavior by other subjects (settlement of disputes, maintenance of peace and order) and (3) protection from deprivation (material security).\(^11\) As, in the course of the 19\(^{th}\) century, the visibility and perception of inequalities increased and nation states set oneself up as settlers of disputes between conflicting industrial parties, ‘protection’ must have presented itself as an age-old, familiar legitimation.

In ‘pre-industrial’ labour relations comparable obligations can be noticed in the patriarchal relation between master and servant. The transfer of the person of the worker, as a servant, into the power of the master used to be compensated by conventional notions of protection and care by the master. Conceptually this was reflected in a distinction between the contractual aspect, the entering into service by what in Weber’s terms would be called a ‘status contract’, and the relational aspect, a ‘status-bound relation of protection’ (Becker), governed, not by legal, but by conventional norms.\(^12\) The personal character of this relation was closely connected to a religiously inspired, conventionally sanctioned moral framework. A shift away from personal to contractual relations in the course of the 19\(^{th}\) century created a void that the nation state finally took as an opportunity, by filling it up, not only to provide for orderly relations but also to strengthen its own position.

\(^9\) To pick one example: in B. Hepple (ed), The Making of Labour Law in Europe, a work directed at reconstructing the development of labour law, the term ‘protection’ is used without any awareness of a need to specify what is meant by it.


\(^12\) Cf. for Germany: Martin Becker (1995), Arbeitsvertrag und Arbeitsverhältnis in Deutschland, Frankfurt aM: Vittorio Klostermann, p. 6.
2.1 ‘Protection’ conceptually

‘Protection’ is thus often used - as I have done up to here - in a yet unspecified way, for instance in the general terms of ‘employment protection’ or ‘social protection’. It seems useful now to distinguish between four possible meanings of ‘protection’, in the framework of our subject:

1. Protection of (formal) rights of citizens (or subjects, members, etc.), by providing for a legal framework and for procedures and means of enforcement;
2. Protection against the consequences of initial unequal (starting) (power) positions in the making of contracts or other legal transactions;
3. Protection against the consequences of an inequality of power which flows from the relation that a contract or other transaction has instituted;
4. Protection against specific risks that flow from a dependency of subjects on the participation in labour markets.

While the first and the second have a rather broad scope, the latter two are specifically relevant to labour relations. I add some comments to each of them:

Ad (1): Adopting labour relations into the framework of state legislation has mainly been a 20th-century accomplishment. The only sense in which it would not be inadequate to couple ‘labour law’ to industrialization is that substantial rules regarding labour until then stretched outside of state law and that legal doctrine, preoccupied by state law, was even hardly aware of them. While substantial regulation of labour relations was for a long time not deemed to be a matter of the state, its task of providing for procedural means gradually became recognized, as these means were, of necessity, mobilized by workers. This first sense of ‘protection’ is close to the minimal, liberal position that the state is there ‘to protect life and property’ (Bentham).

Ad (2): The formal equality of legal subject-positions casts its light backwards on the conditions of contracting: an inequality of ‘players’ could make the ‘game’ unfair. This, second sense of ‘protection’ is the correction of initial positions of contracting partners in such a way that a more ‘balanced’ contract may be expected to result. As from the 14th century, most of the earliest cases of public regulation of transactions regarding labour deal with inequalities of the positions of contracting parties (rather than with the content of relations themselves). Examples in the field of labour relations are rules against pressing, against poaching or against the non-fulfillment of promises to enter service; rules that put limits to one-sided termination of service, or to what may be agreed about the way of remuneration (f.i. prohibition of truck, minimum or maximum wages); and finally, rules that aim at guaranteeing coalition rights or the right to strike.

Ad (3): The third sense of ‘protection’ relates to service or employment as a durable relation, legally based on a contract between formally equal parties, in which nevertheless one party has a right of direction over the other. The one-sidedness of the employer’s control of working conditions – the production process itself, space and time of working, work rules and sanctioning of offenders – may have consequences that are harmful to workers (f.i. for their health & safety) without their being able to influence the conditions in such a way that harm is prevented. This type of ‘protection’ aims at correcting these consequences, either by restricting employers’ range of options directly (f.i.

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13 Jürgen Brand, Untersuchungen zur Entwicklung der Arbeitsgerichtsbarkeit in Deutschland, Bd. 2, Frankfurt aM: Klostermann, 2002, p. 7, notes that the German commercial courts (Gewerbegerichten) up to 1890 handled more than 100 000 labour cases, but legal doctrine appeared not to have noticed them at all.
prohibition of the use of certain toxic materials, restriction of working hours) or by instituting procedures for decision-making within enterprises that aim at providing workers with a say in their working conditions.

Ad (4): Finally, ‘protection’ may concern risks for workers that flow from their dependence on participation in the ‘labour market’ to be able to provide in their means of existence or, more broadly defined, for a decent actualization of their ‘capabilities’. The protection may exist in laws restricting employers’ options of short-term contracting and in legal programs for unemployment insurance or disability benefits, but also, more broadly, in legal measures that provide for training opportunities for workers.

When the protection that labour law should offer is intended “to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship”, in the famous words of Kahn-Freund, mainly protection in the third sense is being meant.

2.2 ‘Protection’ historically

A brief look at history, here mainly based on what is known of ‘Western-European’ relations, may clarify the importance of the notion of ‘protection’ in the realm of working relations. It would be easy to underestimate the importance of ‘protection’ in its second sense, broader defined: of public measures aimed at providing for a ‘level playing field’ of those involved in the production of goods and services. Guaranteeing a level used to be conceived more broadly than it is in its current ‘market’ form: in the regulation of crafts in medieval cities it included, among others, notions of an adequate number of producers in relation to demand (protection of guild membership), of sufficiently equal means of production (guild restrictions on number of personnel) and of fair prices (urging them to compete on quality instead). In the realm of service and employment relations public ‘protection’ figures at an early stage mainly in two forms. First, as legal measures in England to protect employers against the consequences (shortage of labour) of the Black Death in the 14th century, by way of legal measures to force people to be employed, for maximized wages. Second, at the level of medieval cities, as public regulation of what is involved in the hiring process: setting times at which service can be terminated or ended, regulating the duration of service (usually a year), protecting master and servant against the consequences of breaching a formal promise (to hire, to enter service), protecting masters against subversive efforts of other masters (poaching) and protecting masters and servants against the consequences of one-sided termination before the end term of service.

After the formal abolishment of guilds following the French Revolution, the first legislative initiatives tried to counteract the consequences of industrial activities for special categories of workers, in particular children and women. In France in 1813 children below 10 were not allowed to work in the mines, there was related legislation in 1839 in Prussia and in 1843 in Tirol, followed by a wave of laws in the 1870. Protection for women was mainly realized in the 1890, and finally even the regular, male workers were protected in particular against health and safety risks (3rd type of protection). In Germany the lawyer Joseph von Buß pleaded already in April 1837 in the Baden parliament for a

14 As Amartya Sen and others use this term.
broad program of legal protection of workers, including prohibition of the truck system, a three-months term of notice (2nd type), prohibition of child labour and of detrimental work in general, a maximum of 14 working hours a day (3rd type) and relief funds for disabled workers (4th type).

German legislation included in the 1860s the obligation, be it only formulated in general terms, of employers to take measures to protect the life and health of workers. There was, however, also strong opposition against legal interference, not only from liberals who had a yet unbroken trust in the capacity of markets to reach equilibria, provided they were left ‘undisturbed’, but also from adherents to a patriarchal philosophy that forbid undermining the autonomy of the head of the household. Finding political movements and nation states to be ready to use the need for ‘protection’ as a legitimation of legislative initiatives, workers’ organizations also embraced the concept of ‘protection’. In 1901 was founded the International Association for Statutory Workers’ Protection.

In the course of the 20th century a development along two lines can be traced. ‘Protection’, on the one hand, was widely used as an argument for legislative measures in relation to ‘risks’ of workers (the ‘health & safety’ part of ‘protection in the 3rd, and protection in the 4th sense). It thus represents the vertical aspect of direct, substantial restrictions on behavior by the state. On the other hand ‘compensation of inequality’ is the argument increasingly used to legitimate measures directed at altering initial positions of workers in negotiations on the conditions of employment, f.i. in the Belgian and Dutch employment codes enacted at the beginning of the 20th century. These legislative measures in part directly restricted options of contracting parties by withholding legitimacy and enforcement to some of them, or by imposing substantive rules even against contractual clauses ‘agreed’ upon by employer and employees. For another part they were aimed at indirectly improving the quality of industrial relations by facilitating an autonomy of organized employers and employees in regulating their relations. These measures were legitimated by the consideration that legally attributed (de lege) powers presuppose an actual scope of freedom of action that, as far as it turns out to be (de facto) lacking, ought to be re instituted by legislative means, thereby actualizing a minimum condition for an adequate participation in the ‘labour market’. Although covered by what has here been called ‘protection’ in the second sense, these measures were favoured by some authors for their ‘horizontal’, non-patriarchal, autonomy-enhancing character. Significantly, Hugo Sinzheimer, hailed by some as ‘the father of labour law’, hardly ever spoke of ‘protection’ but focused on the ‘substantial freedom’ of workers instead – in his view labour law ought to extend the formal freedom that was already the kernel of the legal position of workers in the labour contract, to also include their real capacities to codetermine the condition of their working lives. The state is accorded an essential position in the safeguarding of industrial relations, but not that of a patriarch

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16 In the regional Gewerbe Ordnungen, f.i. of Sachsen (15-10-1861) and of the Norddeutsche Bund (21-06-1869, § 107) the latter being extended to the entire Reich in 1871. Cf. Becker 1995 (as in note 12): 49.
19 What Ramm (1986: 277) calls the ‘state help’ principle (vs. ‘self help’).
ruling for the ‘protection’ to the better of his poor subjects, but that of a superordinate Third
guaranteeing fair negotiating positions to (categories of) its citizens, and thereby providing for the
basic conditions of their ‘freedoms’, or (in modern, not Sinzheimer’s terms) their ‘capabilities’ to
‘realize that what they have reason to value’.

2.3 Protection: conclusion

An increased awareness of inequalities resulting from socio-economic changes as well as changes in
legal conceptions of labour relations has, in the course of the 18th and 19th centuries, raised calls for
countering these inequalities, as they were perceived to be unjust. Building upon a long tradition of
legal concepts of the relation between rulers and ruled, initiatives to do that by state regulation have
been at first predominantly framed in terms of ‘protection’. I have distinguished between four
senses in which this term has been used, of which the latter two have been specifically related to
particularities of labour as a subject of contractual agreements. In the end, ‘protection’ is, as a
legitimation of legislation, mainly applied to health & safety as well as social ‘risks’ of labour
participation, while a parallel discourse of ‘compensation of inequality’ refers to re-internalizing
inequalities in the capacities to actualize legally accorded powers into the legal discourse. The latter
discourse is continued in current pleas for a ‘constitutional function’ of labour law.

In so far as ‘protective’ or ‘constitutional’ legislative measures are treated in economic discourse on
labour relations, they are primarily considered to be disruptive to the attainment of efficient
equilibrium on the ‘market’. Institutional economics has somewhat modified this stance, admitting
to a contribution of labour law to diminishing transaction costs, but the ‘market’, in a rather abstract
guise, has retained its fundamental position of being regarded as an almost ‘natural’ phenomenon.
Labour law and ‘the market’ seem to be doomed to be irreconcilable opposites. In what follows I
look more closely at economic approaches and argue that this opposition is less inevitable than
usually thought, if we are prepared to loosen some of the tight presuppositions that mainstream
economics applies to them.

3 Economics’ approach to markets and labour relations

In the framework of this paper I cannot be but very brief on this, but the apparent confrontation
between labour law and economics on issues of labour relations, in which labour lawyers sometimes
seem to take a ‘Calimero position’21, urges me to make some critical notes as to the contents and
hegemony of economics as a type of knowledge of ‘economic’ social relations.

3.1 Economics as a reflective knowledge of ‘markets’

Not unlike legal science had done before in the Middle Ages, economics as a type of knowledge
developed since the Renaissance in close connection with an aspired role of advising princes about
‘good policies’ (mercantilism). Recognized as a separate discipline at the end of the 18th century, it
contributed in its liberal form to the victory of nation states in the 19th century. Theories of markets
that took distance of matters of value and politics and made knowledge more abstract, externalizing

21 Calimero is a children’s cartoon film character regularly crying out ‘it’s because I am small and he is big, and
that’s not fair!’
social conditions of market interactions and treating market interactions as a kind of ‘second nature’, won out over other conceptions. During the 20th century economics on the one hand became an academic discipline emulating natural science, by way of formalizing and developing mathematical models, while on the other hand countermovements developed that tried to reintegrate some of what had been externalized, into theory (‘(new) institutional economics’). This reflects a more general ambivalence on the character of economic knowledge: its level of abstraction is being hailed for its eminent universalizing power, while economics is at the same time criticized for its colonization and monoculturalization of social life that drives out important aspects of human living together.

A persistent line of critique on (neo)classical economic theory is that it excludes from theory a lot of ‘social’ preconditions that would have to be fulfilled before it would be possible for markets to function. Historically, regulation and markets grew up together. One important effect of economics would be, however, that it contributes to the disembedding of markets, to such an extent that, according to Polanyi (1944), we are living in a ‘market society’ in which an enduring relation has been turned around, now that the social is embedded in the economic system (instead of the other way around). Markets now regulate themselves and are universalizing spatially, socially and materially.

Economics’ claim to provide for value-neutral judgments on well-being, provided that certain presuppositions be accepted, has been welcomed by those tired of political struggles over issues of values (including politicians). The moral indifference of markets allow them to transcend all kinds of boundaries and to open up a world to economic transactions. Deutschmann (2015) argues that ‘disembedded markets’ rather should be understood as a ‘self-description’ of society (in the sense of Luhmann’s Selbstbeschreibung), that provides for “a historically unprecedented universal form of social unity, which actually never has been achieved even by the so-called ‘world religions’ (…). It also takes at least some (not all) of the classic functions of religious symbolisms as devices to cope with existential uncertainties.”

Economics’ claim of value-neutrality is contested by researchers from a background of sociological or anthropological research or of ‘science and technology studies’ (STS) who argue that the merit of economics would rather be to render valuations invisible. The challenge of mainstream economics, as it has been undertaken by institutionalists, is also adopted by a rather new branch of sociology called ‘economic sociology’, dedicated to further developing knowledge of the ‘embeddedness’ of economic action. Their focus on, and treatment of the social conditions of market behavior has met the criticism that they still tend to implicitly take economics’ notion of an ‘asocial’ market, distinct

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23 This line dates back at least to Emile Durkheim’s notion of the ‘non-contractual conditions of contract’ and to early 20th-century institutionalism in the US.
from ‘society’, for granted and are in fact practicing ‘disequilibrium economics’, analyzing how "social relationships interfere in economic processes" rather than “the ways in which markets map onto the social relations that constitute a framework of ownership, control and decision-making powers.” It is this lack of a proper ‘social’ theory of markets that tempts researchers into adopting the classical economic view of markets, and thus restricts them to making footnotes on the conditions of their functioning. The same goes for labour law that, as Langille (2011) rightly argued, has constructed its “normative world as a response to market ordering. But we have no account of the virtues or limits of market order – only about ‘inequality’ of the distribution of bargaining power within that account.”

To conclude this brief overview, the abstract analysis, as practiced by mainstream economics, of the market as an equilibrium-seeking mechanism under the condition that a number of presuppositions have been fulfilled, is criticized by several research currents, both within and without the discipline of economics. Meanwhile labour law theory is predominantly positioning itself in relation to the market concept of mainstream economics, insufficiently aware of the criticism that has been brought forward to it, both in economics itself and in social theory.

3.2 What about markets?

The existence of ‘markets’ is the founding dogma of economics; as Williamson formulated, with a wink to Genesis, “in the beginning, there were markets”. Despite (or: because of?) the central position of this ‘market primacy assumption’, there appears to be hardly agreement among economists on the content and meaning of the concept. Criteria for the existence of a market appear to be “virtually absent, the implicit assumption being that markets emerge spontaneously whenever appropriate preconditions are present”.

What allows us to say, if we observe human interactions, that what we see is a ‘market’? There is no easy answer. According to Rosenbaum (2000) we might use (1) observational criteria, somewhat extending the common notion of a ‘marketplace’ – but then the question remains: what is more to it than a sum of exchanges that makes it into a ‘market’? Or we might use (2) functional criteria, stressing what markets do, for instance as a mechanism for allocation or for determining relative prices. This is what mainstream economics has developed into an abstract theory of hypothesized demand and supply curves from which calculable outcomes can be obtained. Or, finally, we could use (3) structural criteria, focusing on the institutions or networks facilitating and structuring exchanges. The question regarding these last two types, however, would be: how is the object, to which this function or structure is ascribed, to be identified? The only solution, according to Rosenbaum, would be by way of treating market phenomena as ‘stylized facts’ that “refer to the form or type of

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33 Rosenbaum 2000: 458-60.
the phenomena whose content is to be explained”. They are defined by the presence of four characteristics:

1. **Voluntarity** of exchange (or the possibility of ‘exit’);
2. **Specificity**: “a substantive specification of both parts of the transaction” (f.i. gifts lack this);
3. **Regularity & typification**: institutionalized forms of exchange guaranteeing a relatively constant similarity of commodities;
4. **Competition**: a parallel effort of surpassing opponents by offering preferable opportunities.\(^{34}\)

Exchange is considered to be based on strategic action and is therefore constituted by the (negative) power of being able to choose between entry or exit. This in itself does not specify ‘market action’; for instance the entrance in a firm or making a gift are also considered to be ‘voluntary’ actions. “A market is a social structure for the exchange of rights in which offers are evaluated and priced, and compete with one another.”\(^{35}\) A basic line of thinking about conditions of markets is that market exchanges involve the transfer of rights of access to or usage of a particular good or service. They therefore require a set of rules or institutions to determine what is being exchanged and regulate transfers of rights, and control mechanisms to monitor compliance and for enforcement institutions. This makes markets also into disciplinary environments. Markets as institutions exhibit some continuity and stability and thereby provide an environment that facilitates repeated interactions and reduces transaction costs in a world of fundamental uncertainty.\(^{36}\)

Thielemann (2000) argues that the view on human action, implied by the model of perfect competition of neoclassical economics, mistakenly disregards all non-market values and considerations. “The hypothetic stage, which will never be reached, and toward which the economic process is constantly moving, is taken as the logic of the process itself.” The essence of competition is “the process of eliminating market-alien values.(...) it is the competitive compulsion to replace market-alien with intra-market values that generates growth.” Competition can only be captured by a systemic view of the market. Competition is not a matter of purposeful action, it emerges from exchange. Entering into new relations implies withdrawing from others; destruction thus has to be qualified as an internal effect of the market.\(^{37}\)

While mainstream economists tend to treat the calculative pursuit of individual (‘given’) interests as an axiom, social scientists rather view the mutual indifference and reification of those involved in market exchange as an accomplishment of the institutionalized character of markets. Initially this has been conceived predominantly as a loss, resulting from a selection process in which social action got gradually dominated by economic instead of other motives. It worried, in different ways, Durkheim and Weber and culminated in Polanyi’s ‘market society’.

During the last decades theory on the relation between (market) structure and human action has been further developed in the aftermath of science & technology studies (STS) that have carefully analyzed the pragmatics of the generation and use of knowledge, at first in laboratory settings, in a

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\(^{34}\) Rosenbaum 2000: 468-75.


later stage in economic settings and in the judicature as well.\(^{38}\) In actor-network theory’s (ANT) view of markets, the differentiation between ‘market’ and ‘social context’, that economics tends to take for granted, is analyzed as something that is constantly produced in collective, ‘economic’ practices. What is ‘outside’ of the market, is “defined dynamically in the process of framing whereby agents become temporarily and partially disentangled from other networks to enable a transaction.”\(^{39}\)

Critique of Michel Callon’s initial focus on disentanglement and calculation\(^{40}\) has inspired empirical investigations into the ways in which socio-technical devices act to produce attachment in markets, resulting in attention to ‘qualification’, a process which includes objectification and singularization, as the substance of any market transition. “Through objectification, the object becomes a thing, and through singularization, it becomes ‘a thing whose properties are adjusted to the buyers’ world, if necessary by transforming that world’.”\(^{41}\) Slater (2002) has pointed out that this disentanglement should rather be seen as dialectical: framing ‘extricates’ agents and entities from social networks in order to ‘push them onto a clearly demarcated ‘stage’, but they cannot but retain their links with the world ‘outside’; it is rather a reframing of culturally meaningful items. \(^{42}\) “The ‘impurity’ of actors, objects and calculations is a crucial strategic tool for market actors themselves, all of whom have as much interest in destabilizing markets as in stabilizing them. Framings are political and strategic battle-lines”. \(^{43}\)

In ANT-inspired theoretical approaches, subjectivity is no longer a natural or otherwise self-evident feature of human beings, but something which is being enacted within assemblages (agencements) of human, material, technical and discursive elements. “[M]arket devices format the dispositions and skills of the people who encounter them (...) [and] equip people with the tools and skills necessary to operate as producers and consumers”. \(^{44}\) Knowledge is being generated in situated exchanges that occur as part of market performance; it partakes in shaping reality (f.i. SIM-cards are materializing ideas about markets), in some cases to such an extent that the notion of the performativity of economic knowledge is being used, in the sense of the effect that a transformation in the ‘real’ world is mainly effected by new economic knowledge, or, more precisely, of “translations from practices enacting ideas about economic exchange towards practices enacting such exchanges”. \(^{45}\)

In these approaches, we are far removed from the idea that there would be some kind of ‘natural’ order to markets. Firms “aim at a profitable stabilization of the market, but they do this by

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40 “attempts to characterize either modern markets or a modern economic order (capitalism) in terms of a purified mode of calculation have largely failed.” (Don Slater, “From calculation to alienation: disentangling economic abstractions”, Economy and Society 31,2,234-49 (237).
41 Mcfall 2009: 271, citing Callon & Muniesa 2007: 1234: “the purchase is not the result of a subject-object encounter, both external to each other, but of a process of attachment, which, from the qualification to the requalification of the product leads to the singularization of its properties” (f.i. advertisement). Mcfall p. 279: “The notion of hybrid, collective market devices or agencements offers a practical alternative to the idea of pure subjects seduced into desire for pure objects that can never quite deliver the magic promised by advertising.” It “avoids such a divide and the associated pitfalls of essentialism and relativism”.
44 Mcfall 2009: 279.
persistently destabilizing it.\textsuperscript{46} The structure of markets, and what is being presented as knowledge of markets, are part of the competitive struggle itself. Even if we only look at what is happening at physical marketplaces that we are familiar with, this is not really a surprise. The market mechanism, like it has been idealized by neoclassical economics, is a normative foundation of competition in markets, but if competition would really be ‘perfect’, then individual gains would tend to zero. The individual traders usually are very well aware that the more they can locally hinder the actualization of the conditions of competition, the more there is for them to be gained. An important role thus falls to the market inspector and the enforcement of rules that should guarantee fair competition. This already indicates that, as we take leave of the idea of a natural order of markets, we are not doomed to accept a reckless relativism: knowledge is part of the struggle, but the struggle is there because a normative structure is definitely needed by all, and will, however vulnerable, be there.

I will come back to the question what we might be able to say on general requirements of this structure in \(\S\) 4. We should first pay some attention to the application of ‘market’ on labour relations.

### 3.3 Labour markets

In what way have we come to talk about labour relations in terms of the existence of ‘labour markets’? Although this approach is nowadays, as a kind of abstract and ahistorical heuristic model, retrospectively applied to socio-economic relations of even several millennia ago\textsuperscript{47}, we ought to be aware that these relations are products of human agency, and that the notion of ‘markets’ has been part of the conceptualization-in-practice of these humans for just a relatively short time. Part of the problem might be that labour lawyers often seem to identify employment with the industrial age, while ‘wage labour’ is at least known since the 7th century (Lombardia)\textsuperscript{48} and made up, already at the end of the 13th century, more than half of the work done in England and the Netherlands.\textsuperscript{49} Therefore it is here of practical importance to distinguish between three stages of development according to the way the notion of ‘labour market’ is being used – in terms of Giddens’ double hermeneutics, as a ‘second order’ or also as a ‘first order concept’ (see table 1).

<table>
<thead>
<tr>
<th>Period (roughly):</th>
<th>Contemporary practices and doctrines</th>
<th>‘Labour market’ as a concept in current theory</th>
</tr>
</thead>
<tbody>
<tr>
<td>Middle Ages - 18th C</td>
<td>Contemporaries know what to do in physical markets but do treat work in other terms - not as marketable ‘labour’, neither in practice nor in doctrine</td>
<td>Concept is retrospectively applied to phenomena that are considered to correspond to those treated in current theories of markets</td>
</tr>
<tr>
<td>18th - end of 19th C</td>
<td>Manufacture holds on to familiar practices &amp; notions, part of (economic) doctrine embraces ‘market’ as a notion to be applied to labour relations, industry &amp; policy partly adopt, while practice tends to resist</td>
<td>Concept is partly adequate in its application to contemporary policies but, apart from that, to an important extent at odds with contemporary labour relations practices / notions</td>
</tr>
<tr>
<td>End of 19th C - current</td>
<td>Market notion forces itself upon or ‘trickles down’ into labour relations practices that are also by participants conceived in comparable terms</td>
<td>Second-order concept ‘market’ is increasingly adopted as a first-order concept that co-constitutes actual labour practices</td>
</tr>
</tbody>
</table>

\textsuperscript{46} Slater 2002: 248.
\textsuperscript{47} F.i. by economic historians in research into relations in the Roman Empire.
\textsuperscript{48} A. Dopsch (1922), \textit{Die Wirtschaftsentwicklung der Karolingerzeit}. Weimar (II: 170).
Let me illustrate this, and remember that we should be aware of the ease with which we tend to use current terms for contemporary phenomena. An important early shift in ‘labour relations’ that we nowadays tend to analyse in ‘market’ terms has been the impact of the Black Death in the 14th century. In England it caused the death of one third of the population and it thus had a significant impact upon the number of people available for work, for instance in relation to the area used in agriculture. It both appeared to put an end to the practice of using conversi (lay brothers) as workers in monasteries and in the cities resulted in a sudden rise in wages that inspired the English Crown to significant legislation to counter these effects. Although an awareness of the relation between Black Death and rising wages was clearly present, it was at that time not framed in ‘market’ terms; only nowadays we interpret it in market terms of a ‘shortage of the labour force’.

Apart from this early legislation, made possible by the specific early centralization of power in England, early charters of Dutch cities regulated labour relations in a way that may figure as another example. What we now term ‘labour relations’ was hardly a legitimate subject of their rulings except for the conditions of entering into, and of one-sidedly terminating relationships, subjects that we would now be inclined to relate to contracting for market relations. In as far as it would be sensible to apply the term ‘contract’ to these reciprocal legal actions at all, what one ‘contracted’ about was mostly only entering a position, making one’s services available to another for a usually conventionally defined time (a year, half a year, for those less lucky: a day) against an also often conventionally defined wage. It was what Max Weber called a ‘status contract’, far removed from the idea that ‘parties’ would be able to negotiate its terms, far removed also from an association with sales contracts. The general term ‘hire’, without specific legal significance, was not uncommon for service relations, indicating the transfer of a part of one’s autonomy to a master.

It was only the turn of the French Revolution and its impact on thinking about constitutional and legal relations which led to a revaluation of these terms and to their rapprochement towards sales contracts. Enlightenment theorists favoured ‘contract’, in particular in its negative purport of being a way to take leave of what they saw as hierarchical models of labour relations (feudal corvée, guilds). But a crucial problem was how to reconcile the formal legal autonomy of citizens with the subordinate positions that these same citizens could, and needed to have in relations in which they were employed by others. They solved it by embracing Locke’s idea that man ‘owned’ his labour power and was thus also entitled to alienate it, if only not for life (as that would amount to ‘slavery’). That brought in ‘contract’, rudimentarily slid into the new Civil Codes of the beginning of the 19th century on the continent, to be further developed into ‘labour’ or ‘employment contract’ in the course of the 20th century. The nexus of ‘labour’ and ‘sales contract’ has, as is well known, been a rock of offence to quite a number of critics, including Karl Marx and a whole tradition of socialist thinkers, Otto von Gierke and other historicist thinkers, and Karl Polanyi who argued that labour as a commodity is just a fiction, though a fiction with a crucial impact on socio-economic relations. Even the Dutch legislator of the Employment Act 1907 admitted to treating labour as ‘a good’ but as:

50 “[He] is Master of himself and Propriety of his own Person and the actions or Labour of it” (John Locke, Two Treatises).
51 “The commodity description of labor, land, and money is entirely fictitious. Nevertheless, it is with the help of this fiction that the actual markets for labor, land, and money are organized; they are being actually bought and sold on the market; their demand and supply are real magnitudes; and any measures that would inhibit the formation of such markets would ipso facto endanger the self-regulation of the system. The commodity fiction, therefore, supplies a vital organizing principle in regard to the whole of society affecting almost all its
“a good of a very special nature. Every other good may be kept in stock for a longer or a shorter time without loss of quality or quantity. Only with respect to labour this is not possible. Labour cannot stay unused for a moment, without being at the same time partially wasted. (...) Another peculiarity of labour, which makes the position of the workers unfavourable compared to the position of the employers, is that one who has to sell his manual labour to stay alive, in general does not have anything else but that labour to maintain livelihood.”

In the literature quite a number of specific characteristics of labour relations have been put forward that would make it problematic to treat ‘labour’ as something to be traded in markets, at least if they would have to meet the requirements of ‘perfect competition’ in the sense that neoclassical economics accords them. I summarize:

(1) ‘labour is not a commodity’(1): labour is not ‘produced’, as other commodities are, to be traded in the market (nor are the other ‘fictitious commodities’: land and money);”

(2) ‘labour is not a commodity’(2): it cannot be kept in stock, but is, if unused, immediately wasted;

(3) ‘labour is not a commodity’(3): it does not have an existence as something that is, or can be separated from its owner; positively formulated: it is inseparably linked to the life (or the ‘functionings’) of the worker;

(4) Market transactions are performed by way of a labour contract that has been modelled after sales at a ‘spot market’, which is inadequate in view of the temporal dimension;

(5) ‘Sellers’ are to a large extent not offering voluntarily (Rosenbaum-1, see his criteria listed above), “the opportunity costs of not accepting an exchange offer” may be too high;

(6) After accepting, employment may not be ‘voluntary’ by lack of actual ‘exit’ options, as the opportunity costs of ‘exit’ may be too high, for the worker or for the employer;

(7) Which may be related to specific investments made by a worker or employer in the course of their relationship that may increase the relative costs of change / mobility;

(8) The requirement of substantive specification of both parts of the transaction (Rosenbaum-2) is not being met: contracts are ‘incomplete’ in that components on the worker’s side cannot be specified ex ante and are left open or remain implicit;

(9) This ‘incompleteness’ of contract, this lack of specification is compensated by assigning the employer a right of direction that is not easily reconcilable with the formal equality of contractual parties;

Institutions in the most varied way, namely the principle according to which no arrangement or behavior should be allowed to exist that might prevent the actual functioning of the market mechanism on the lines of the commodity fiction” (Karl Polanyi (1944), The Great Transformation: 72-3).


54 This is a main point of marxist critique of the labour contract. In labour law f.i. put forward by Sinzheimer.

55 Nogler & Reifner 2014.


58 Hugo Sinzheimer, Grundfragen des Arbeitsrechts (1927) has developed this point, building on the writings of Otto von Gierke.
Inelasticity of labour supply, that does not, or only to a very low extent, respond to fluctuations in demand, and is mainly determined by demographic and policy factors;

Inelasticity of wages and other conditions that are predominantly determined, not by supply and demand, but by social customs, norms and institutional arrangements.

Orthodox economists tend to argue that these are just the insufficiencies and asymmetries of actual life, but that they do not in any way alter the relevance of the model of perfect competition. In this regard their model of the market functions as an abstract normative frame, a yardstick against which actual relations are measured to be always in some respects insufficient, with the purport, implicitly or explicitly, that making conditions meet the requirements of this idealized market is the good thing to do. W.A. Jackson (2007) has shown to what extent already normal sales markets differ from the model of neoclassical economics and lists five structural factors of markets that make asymmetry of markets rather the rule than the exception. The orthodox conception of markets incorrectly treats these factors as external contingencies; the methodological individualism of its approach tends to regard structural relations among agents as ‘imperfections blocking the path to allocative efficiency’.

Jackson is pleading for doing away with the ‘unduly restrictive’ definition of markets as competitive and impersonal, in favour of a ‘layered theory’ of markets that can handle various types of them but still distinguish them from non-market activities. Markets “rely on trading routines backed up by elaborate institutional support. [They] can be understood only by playing close attention to their social and institutional background.” Such an approach of markets would require us to take leave of the abstract market model of orthodox economics, but possibly not of its normative implications.

If we would turn back the exclusion of structural factors that orthodox economics has operated and work towards a more ‘layered theory’ of differentially structured markets, what would the consequences be for a conception of the ‘labour market’? Would it be possible to derive general requirements from a ‘realistic’ account of the structure of labour markets? That is the question that I will handle in the next section.

4 Requirements of labour markets and labour law

In an orthodox conception of markets, the legal requirements for markets are usually restricted to the basic institutional conditions of ‘property’, ‘contract’ and ‘enforcement institutions’. In the wake of the institutionalist turn, more substantial requirements have been added to these basic, and rather formal ones, mainly focusing on institutional provisions that are reducing ‘transaction costs’ as well as on conditions to be met to enable workers to participate in the labour market. Simon Deakin (2005), for instance, argues that:

“in order to participate effectively in a market order, individuals require more than formal access to the institution of property and contract. They need to be provided with the

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60 Jackson 2007: 235.
economic means to realise their potential: these include social guarantees of housing, education and training, as well as legal institutions.”

These requirements refer to the equipment of individual workers, to be provided for by adequate institutions. Still one step further is to also allow for a structure of personal relations and of motivations to have a role in markets. Jackson (2007) notes:

“For market structures to be reproduced over long periods, a core of agents must be prepared to support them; roles need willing occupants, and personal relations need active personal involvement. Engagement with market structures is necessary for markets to survive, and a market made up solely of casual traders would be unable to function smoothly and replicate itself. (...) Diverse agency-structure relations add richness to market behavior and move us further away from a single market template.”

This includes ‘legitimacy’ and ‘sustainability’ in the conditions of the functioning of markets. In the following I will go further into the possibilities, as well as the restrictions, of accepting a broad definition of markets and to mobilize their requirements for a redefinition of ‘labour law’. I would argue that, to a considerable extent, rules of labour law need not be framed in terms of an external ethics of human relations, but flow from internal requirements of the labour market itself.

4.1 Requirements of markets

To summarize the broad concept of ‘market’ from which I start, a market is here considered, first, as a socio-technical device that renders certain actions and processes ‘economic’, creates subject positions (‘buyer’, ‘seller) to be taken by participants and provides for a - technical, social, cognitive, normative - structure that constitutes and facilitates “the conception, production and circulation of goods, their valuation, the construction and subsequent transfer of property rights through monetary mediation, exchange systems and systems of prices.” This structure thus includes accounts of itself of a cognitive as well as normative and legitimation-providing nature, securing active participation in it. Secondly, I assume that economists rightly attribute to the liberal version of this device the capacity to generate efficiency gains, provided that a controlled level of competition at markets is being secured. And it is, finally, supposed that markets are there to stay, that they should not themselves generate conditions that undermine their own existence, which results in requirements that flow from their sustainability.

As from these three suppositions, a number of general requirements for the functioning of markets can be listed. Markets generally require:

1. An institutionalized definition of what categories of persons can participate in a market, legally defined: of legal subjects that have a capacity to make transactions;
2. An institutionalized definition of what can be a legitimate object of market exchange (and what not);
An institutionalized attribution and definition of dispositive powers of participants as to ‘goods’, the optimum being ‘full property’;

Free and equal access of potential participants (access not being dependent on ‘outside’ restrictions like personal or familial ties), institutionally guaranteed;

Freedom of choice in the use and deployment of resources, institutionally guaranteed;

Availability of adequate mediums of exchange, the optimum being full availability of a stable currency;

Information on the availability, qualities and costs of resources to be deployed, the optimum being complete transparency to all participants;

Rationality of choices made on the basis of an optimal deployment of resources, the optimum being complete purposive rationality, as it results in maximum predictability of others’ actions and by that way in ‘trust’;

Institutionalized ways of making goods commensurable, as in technical means of weighing or measuring, or of establishing qualities of goods;

Institutionalized sets of legal forms to be mobilized for the legal design of transactions (contract, transfer of property);

Freedom of choice to make these transactions and to make use of these legal forms (‘freedom of contract’);

Institutionalized procedures and provisions for the enforcement of transactions;

In case of durable contracts: the freedom to terminate contracts, under reasonable conditions, and to switch to another supplier / partner;

Predictability of actions of government (‘rule of law’, not too frequent fluctuations of policies);

Predictability of the actions of the judicature (basically: judges are to be recruited in conformance with ‘Weberian’ criteria);

Institutionalized governance structures for cooperation within and between enterprises;

A sufficient number of participants in the market (the required number being dependent on the structure of the required competition);

Sustainability of the goods that are being traded; competition should f.i. not lead to an exhaustion of resources or a fatal decline of quality of products;

Sustainability of the relations at the market itself (the market structure should not result in excessive power differences between participants or cause frequent, turbulent exit or entry;

Sustainability of the distribution of wealth between participants: the ‘skewness’ of the distribution should not exceed a certain maximum.\(^\text{65}\)

These twenty issues may be classified in four categories, of requirements as to:

A. **Capacities** (1, 2, 3) or **freedoms** (4, 5, 11, 13, 17) of participants, guaranteeing legitimate action capacities as well as open access to markets;

B. **Rational** decision-making and the **predictability** of mutual actions of participants (6, 7, 8, 9);

C. Socio-temporal **stabilization** of transactions (10, 12, 14, 15, 16);

D. **Sustainability** of markets (17, 18, 19), in that the effects of its structure should not undermine the functioning of a market.

\(^{65}\) Comparative research indicates that a relation between lowest and highest incomes that exceeds 1:10 has a negative draw back on the functioning of market economies.
### 4.2 Requirements of labour markets

Remembering that the ‘good’ to be traded at labour markets has its peculiarities as a ‘fictitious’ commodity, and building upon the analysis of markets in section 3, we may treat labour markets as markets that have to be framed in a particular way in order to create the conditions for competition that will contribute to the efficiency that economists attribute to the market mechanism. This is not simply a matter of ‘addressing market failures’, as economists and in their wake labour lawyers often assume, accepting a view of quasi-natural mechanisms to which participants unfortunately are only defectively able to adapt. If we would use the concept of ‘market failure’, then for a combination of structural conditions that do not result in a sufficiently competitive market, do not sufficiently contribute to collective well-being and do not sufficiently take care of its sustainability. I therefore adopt a conception of (labour) markets as including regulation that has a ‘market-constituting role’.

If I apply the requirements, developed above, to labour markets, the results may be elaborated as follows (I stick to the numbering as used above):

**Ad (1):** Markets, as defined above, require defined positions of participants. The legal capacity to make transactions on the right of use of one’s own ‘labour capacity’ is a basic right in labour law, at least since the abolition of slavery and of feudal *corvée* and other dependency relations at the end of the 18th century. The institutionally defined capacity of the transfer of control over one’s labour power creates the differential subject positions of those who accept this transfer (the ‘employers’) and those who do the transferring (the ‘employees’). This capacity is qualified by minimum requirements as to age or may be restricted by rules on deficient mental capacities of citizens, because they don’t qualify for competences that markets minimally require.

**Ad (2):** Markets, and thus also labour markets, need to be also defined by what is the legitimate object of trade. While ‘labour’ was for a long time considered to be an object of transactions only in exceptional cases, since the 18th century the ‘labour contract’ gradually became accepted as a legitimate type of transaction. Labour by minors has gradually been excluded, to an important extent on grounds of sustainability of the labour force (requirement 18). Certain types of human activities may be excluded from being recognized as ‘labour’, not on a basis of ‘protection’, but of cultural valuations, f.i. ‘sex labour’.

**Ad (3):** Markets require an institutionalized attribution and definition of dispositive powers of participants as to ‘goods’, in labour markets the attribution of power over money on the one hand, over the use of one’s ‘labour capacity’ on the other hand. This requirement implies a delimitation of what is included in this ‘labour capacity’ and what is to be ‘external’ to it and not disposable to those who hire it. Labour law is there to take care of this task, not of ‘protection’ of the ‘external sphere’, but of specification of dispositive powers.

**Ad (4):** Markets require free and equal access of potential participants. Access ought not to be restricted by ‘external’ considerations that are, from a market perspective, irrelevant. The institutional guarantee of free access consists, apart from rules of competition law, of a whole branch of rules of labour law, prohibiting discrimination and guaranteeing equal treatment in the labour market, intended to make the irrelevance of these ‘external’ considerations enforceable.

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Ad (5): Markets require a freedom of choice in the use and deployment of resources. Labour markets thus require, on the demand side: freedom of choice in recruiting available, differentially skilled or experienced workers; on the supply side: free choice of soliciting for jobs where one might optimally put one’s skills and capacities to use. Guarantees are to be found in legal rules regarding freedom of contract in labour relations.

Ad (6): Markets require the availability of adequate mediums of exchange, in labour markets represented by the requirement of remuneration of labour in cash. Labour law therefore prohibits ways of remuneration that are in kind or that combine cash payments with market-foreign duties like those that used to be part of the ‘truck system’ (and run counter to (5)).

Ad (7): Markets require adequate information on the availability, qualities and costs of resources to be deployed. At the demand side of labour markets, this requirement is partially met by the introduction of qualification systems that are aimed at increasing the transparency of available skills and experience. Restrictions are put, by labour law clauses, on the availability to employers of those kinds of information that might counter the equal treatment of requirement (4). Explicit agreements on the conditions of employment, facilitated by labour law, contribute to meeting this requirement on both sides of the relation.

Ad (8 and 9): Markets require rationality of choices and the predictability that it entails, as well as commensurability. Qualification systems play a role in this, as well as pay scales or other systems of differentiation of remuneration that can contribute to market order and to the reduction of transaction costs of enterprises.

Ad (10 and 11): Markets require institutionalized sets of legal forms to be mobilized for the legal design of transactions’ as well as ‘freedom of contract’, the free choice of using these legal forms. Law provides for different models of contracting (also: contracts for ‘independent workers’), of which the employment contract is, of course, a prominent one. By offering a ready-made package of clauses, the employment contract on the one hand reduces transaction costs, on the other puts different levels of restrictions upon the freedom to negotiate the terms of employment.

Ad (12): Markets require institutionalized procedures and provisions for the enforcement of transactions. Labour law provides for procedural means to enforce employment contracts.

Ad (13): The dynamics of markets require the freedom, in case of durable contracts, to terminate contracts, under reasonable conditions, and to switch ‘partners’. The durable character of employment contracts generates a partial contradiction between the fifth and twelfth requirements, to be solved by labour law, that is not so much providing ‘employment protection’ as specifying the conditions under which premature termination of contract would be allowable.

Ad (14 and 15): Markets require the predictability of actions of government and of the judicature. Labour law’s institutional arrangements provide for rules and jurisprudence that contributes to the predictability of the legal regime.

Ad (16): Markets require institutionalized governance structures for cooperation within and between enterprises. In labour markets the employment contract embodies a contradiction between the formally legally equal position of contracting parties and the relation of subordination which flows from the power of direction of the employer. For the internal relations within enterprises compensatory structures of codetermination have been introduced and regulated by labour law.
Ad (17): Markets require a sufficient number of participants [no labour law clauses on this].

Ad (18): Markets require the sustainability of what is being traded; competition should not lead to an exhaustion of resources or a fatal decline of quality of products. For labour markets this requirement means that qualities of the labour force should not be diminished by the effects of the functioning of the labour market. An important part of labour law owes its existence to this requirement that can refer to guarantees related to the health of workers, to their education and skill, to their chances of providing in the costs of daily existence and to the procreative abilities of their families. So this requirement has led to occupational health & safety rules, to limitation of working hours, to rules on training opportunities, to income compensation schemes (in case of sickness, disability or unemployment of workers) and to rules that to some extent facilitate the raising of children.

Ad (19 and 20): Markets require the sustainability of relations at the market itself and should not generate excessive power differences between participants, or frequent, turbulent exit or entry. Excessive differences could lead to monopsony-like relations that frustrate the functioning of a market. Measures that counter such disequilibria contribute to the functioning of markets and the prospect of efficiency gains that they hold out. Collective labour law fulfills an important function in this, not so much, again, for the ‘protection’ of workers, as for the actualization of a level of equilibrium that the market itself requires.

4.3 Requirements: conclusions

A substantial number of labour law rules, that used to be grounded in the need of ‘protection’ of workers, can be reframed as requirements that flow from the structure needed to make labour markets function in a competitive, welfare-enhancing and sustainable way. A condition for this result is that we distance ourselves from the narrow ‘market’ concept of orthodox economics and rather conceive markets as devices that include both humans, participating in them, technical arrangements and regulation that is in part constitutive of their functioning.

This is partly not a new enterprise. Hugh Collins has pointed out that if one uses “a different economic analysis and a more complex conception of social justice than welfare maximization, one can produce a different outcome that justifies quite an elaborate labour law system.” Collins, however, still sees them as instances of ‘protection’ and considers them to be vulnerable to a charge of “excessive paternalism”. I would argue that this would be only so if one conforms to the narrow market conception of orthodox economics. What can be derived from a differential consideration of markets as arrangements, as set out above, are rather constitutional conditions of market participation than the ‘mandatory protections’ that Collins refers to.

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Conclusions

There may be good reasons to argue for a constitutional role to be accorded to labour law, as Hugo Sinzheimer did at the beginning of the twentieth century and for instance Ruth Dukes is doing nowadays.68 There may also be good reasons for developing a new external normative foundation (Langille) or for radically extending the concept of labour itself (Fudge). My goal is this paper has not been to discuss these efforts, but has been much more limited: to see how far we can get if we take a less narrowed economic concept of ‘market’ seriously, and therefrom derive conditions that should be fulfilled to make labour markets into mechanisms that optimally combine competition, the realization of well-being and sustainability.

This allows us, I have argued, to take leave of ‘protection’ as a stated primary goal of labour law. I have distinguished between its different meanings and made some notes on the history of this concept (only some - although I am convinced that the usual historical myopia of labour law would badly need a more enduring correction). In labour law’s account of itself, ‘protection’ confronts a ‘market’ that usually figures in the guise that economists have draped it with. In section 3 I have used both non-orthodox, institutional economics and sociological theory to alter the view of markets as quasi-natural mechanisms and worked towards a broader concept of what the ‘labour market’ would comprise and entail.

In section 4 I have derived twenty requirements that a well-functioning (labour) market would have to meet, and analyzed to what extent labour law rules, that use to be argued for as needed to ‘protect’ workers, can actually be considered to flow from requirements of a well-functioning market. To a large extent the issues to be covered by labour law arrangements appear to flow from these requirements, making a justification in terms of ‘protection’ unnecessary. The content of the actual regulation of these issues, however, may be highly variable, dependent upon complex, local market relations.

The question may be raised how this type of analyzing labour law rules as market requirements relates to ‘constitutional’ approaches to founding labour law. What I have tried to do in this paper may be only successful if a broader concept of the ‘labour market’ would be acceptable to a less orthodoxically conceived economics (that would be invited to give up some of its level of abstractness), and if sufficiently objective criteria of ‘well-being’ and ‘sustainability’ could be developed. We ought to be able to set out that it flows from an effort to take the economists’ idea of competition, as a mechanism to increase well-being, seriously, though in a way that differs from the usual elaboration by orthodox economics. If so, we would be able to prevent labour law from being regarded as consisting of only ‘external’ restrictions on the ‘pure’ functioning of the market or of ‘corrections’ of market failures. A defensive position in terms of ‘protection’, that seems to be without any prospect in view of both the hegemony of economics and the 21st-century cultural developments that it entails, could then be exchanged for one of defining positions in such a way that a playing field is constituted that will generate optimal well-being and sustainability.